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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILSON LEE TUBBS III,

Defendant and Appellant.

A140731

(Mendocino County Super. Ct.
No. SCTMCRCR 12 70633)

While in the care of her foster father, Wilson Lee (“Josh”) Tubbs III,¹ five-month-old Emerald H. died of a brain injury caused by blunt force trauma. Josh was convicted, by a jury, of assault on a child causing death (Pen. Code, § 273ab; hereafter section 273ab)² and sentenced to a term of 25 years to life. Josh contends his conviction must be reversed due to prosecutorial misconduct. We disagree and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Prosecution Case

1. Emerald’s Birth and Removal

Emerald H. was born in Fort Bragg in June 2012 to Jennifer C. and James H. James H. was in jail when Emerald was born. Jennifer C.’s other children had been

¹ Appellant is known by the first name of Josh and his wife by the first name of Marte. Because they share the same last name, we use these first names when referring to them individually.

² “Any person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child’s death, shall be punished by imprisonment in the state prison for 25 years to life.” (§ 273ab, subd. (a).)

removed from her custody prior to Emerald's birth. Mendocino County Child Protective Services (CPS) agreed to work with Jennifer C. to help her keep Emerald with the assistance of an additional supportive adult.

Two days after birth, Emerald was discharged from the hospital by pediatrician Vicki Soloniuk. Records from the discharge examination and additional examinations by Soloniuk and a nurse practitioner over the next week indicate Emerald was doing well. However, nine days after her birth, Emerald was removed from Jennifer C.'s custody after it was reported that Jennifer C. handled Emerald roughly and took her to a house known for drug activity. An emergency room physician performed a complete medical examination of Emerald and found no neurological issues associated with shaken baby syndrome. An ultrasound was used to check for fluid in Emerald's head. Emerald's brain and head appeared normal.

Emerald was temporarily placed with Rebecca Ostler, a former special education teacher and experienced licensed foster care provider. At the time, Ostler was providing foster care for five persons with special needs ranging in age from 10 to 27. Emerald initially had feeding difficulties, but she did well once Ostler obtained a special bottle nipple for Emerald's cleft palate.

Emerald was seen by Soloniuk several times during July and early August. She was doing well and gaining weight. On July 3, Emerald was checked again for signs of shaken baby syndrome. A prior examination by an ophthalmologist to check for retinal hemorrhages was negative. Emerald's fontanel was checked for signs of any bleeding in the brain.³ Nothing indicated she had been shaken. During the first week of August, Ostler took Emerald to the University of California, San Francisco (UCSF) for her cleft palate, and surgery was planned for a later date. Emerald was "really thriving."

³ As described by Soloniuk, the fontanel is the area of an infant's head where the skull bones have not yet fused together.

2. *Emerald's Move to the Tubbs' Home*

Immediately after her removal, James H. expressed his preference that Emerald be placed with his cousin Marte and her husband, Josh. A CPS employee visited the Tubbs' home and believed it would be a good placement for Emerald. Marte worked full time as a certified nurse's assistant, and Josh would be the primary caregiver. Their 17-year-old daughter, S.T., would help Josh care for Emerald when Marte was at work.

Emerald began transitioning to her new foster family on October 19. CPS's plan was to have Emerald go back and forth between the two homes over a period of about 10 days until she permanently moved on October 31.⁴ Shortly before the transition began, Emerald saw Soloniuk, who noted: "Developmentally [Emerald] was on track. She was laughing. She was trying to roll. And, physically, she appeared well." Christy Berrettini, a special needs teacher, and Maureen Peter, a speech therapist, were assigned from the Early Start program to perform a developmental evaluation of Emerald. They first saw Emerald on October 23. Although a full assessment was not performed at that time, they found Emerald to be "pretty typical" for a baby of her age. She was alert, looking around, and reaching out. Emerald smiled, engaged with people, and made cooing sounds one would expect from a slightly younger child, which was attributed to Emerald's cleft palate. She was described as a "happy little baby," and neither Berrettini nor Peter had any neurological concerns.

On October 26 and October 28, Emerald visited the Tubbs' home overnight. On October 29 and 30, Emerald had a fever and was vomiting. Soloniuk saw Emerald on November 2. Emerald was coughing and vomiting, and appeared to have a virus. Josh and Marte brought Emerald in again, on November 9, reporting that she had been rubbing her eyes and seemed fussy. Emerald's eyes appeared slightly irritated and Soloniuk prescribed Benadryl.

⁴ Emerald also had supervised visits with Jennifer C. and James H. during this time—on July 26, August 22, September 19, October 10, and October 24. The visitation supervisor, Rita Hurley, ensured that Emerald was never left alone with her biological parents. Hurley never observed any problems or injuries.

On November 13, Berrettini and Peter saw Emerald again for a full developmental assessment. Peter felt “[i]t was as if I were seeing a totally different child.” Berrettini found Emerald had regressed such that her development appeared to be that of a newborn. She took no interest in people or her surroundings. She did not smile and had drool coming from one side of her mouth. Her tongue rolled around the right side of her mouth, and she made whining noises. She held the backs of her hands to her eyes, vomited, and was clearly in discomfort. Emerald could not hold her head up, her body leaned to the right, and her right foot kicked in a circle. Neither Berrettini nor Peter saw any injuries or bruising. Berrettini was concerned about seizures or other neurological problems and recommended that Josh and Marte take Emerald to UCSF right away. Marte followed-up with Berrettini and indicated that she could not get a referral to UCSF.

On November 14, Marte, Josh, and Emerald returned to Soloniuk’s office. Emerald was referred to an optometrist. The optometrist observed that the tissue on Emerald’s corneas had been abraded or scraped off. The optometrist concluded Emerald likely inflicted the injuries herself because she was “under duress,” because “it already hurt[,],” or because her eyes itched. He did not look for retinal hemorrhages, but opined that it was unlikely they would have caused her to rub her eyes. Emerald was given an antibiotic and, by November 16, the optometrist pronounced her “90 percent healed” because she was “happy and looking around.”

3. *Emerald’s Death*

On Friday, November 30, Marte left on a planned trip out of town and said she would be back on Sunday. S.T. went out later that night, leaving Emerald with Josh. When she returned home, everything seemed normal with Emerald. At the time, Emerald had a small bruise on her forehead from striking herself with some plastic baby keys. When S.T. went to her room to sleep, Emerald was with Josh, who was watching television on the couch.

When S.T. woke the next morning, on December 1, Emerald was in her baby swing next to the couch. At about 3:00 p.m., S.T. took Emerald next door to the home of Josh’s sister, Jennifer Johnston. They tried to play with Emerald, who just lay there

without smiling. Johnston and S.T. bathed Emerald. S.T. did not observe any injuries. She returned home with Emerald around 6:00 p.m., then went back to Johnston's for dinner. When S.T. returned after dinner, Emerald was sleeping in her swing and Josh was sitting on the couch.

S.T. went out again and returned around 8:30 p.m. Emerald was lying with Josh, and S.T. noticed a red mark on Emerald's right eye. S.T. asked Josh what happened. He explained that Emerald had vomited while he was feeding her. He had put her on the changing pad on the kitchen table to change her clothes. When he rolled her over, she hit her head on the baby keys, which were on the pad. S.T. denied being upset that evening. But when a friend texted her and asked what was wrong, S.T. sent a text reply, "Just everything going in [*sic*] and the baby wont stop crying and she has like black and blue on her eye like she fell or something idk^[5] fuck."

S.T. went out again at 9:30 p.m.. When she returned about an hour later, Emerald was asleep in her swing. The mark on Emerald's eye was getting darker. S.T. lay on her bed with Emerald for a while, then gave her back to Josh, who was on the couch watching television. S.T. went to sleep in her bedroom, leaving her television on at a low volume. S.T. woke up between 9:00 and 10:00 a.m. on Sunday morning. Emerald was in the swing, and S.T. observed three or four marks on her face, including the one from the night before. She asked Josh what happened. He told her that the dog had knocked over the changing pad and Emerald fell to the floor on her face.⁶ She accepted his explanation.

At about 11:00 a.m. on Sunday, December 2, Josh brought Emerald to the emergency room at Mendocino Coast District Hospital. Dr. Andrea McCullough found Emerald had a pulse but was not breathing. Even before she realized that Emerald was not breathing, however, McCullough noted extensive bruising on every part of Emerald's head and face. After Emerald was intubated, the registered nurse on duty, Travis

⁵ "Idk" is a texting shorthand term for "I don't know."

⁶ The changing pad, on the bench, was later measured at 21 inches above the floor.

Skinner, spoke with Josh in the waiting room. Josh told him the same thing he told S.T.—the night before, the dog had bumped Emerald off the changing table. Skinner was puzzled because the bruises were not consistent with a fall.

Because Emerald obviously had a major head injury, McCullough ordered a CT scan. The scan showed skull fractures with a considerable amount of brain bleeding. Emerald had subdural hematomas on both sides of the brain, and fresh bleeding on top of old blood. McCullough said the amount of bruising on Emerald's head was "shocking" and could not have been caused by the short fall Josh described. Emerald was sent by helicopter to Children's Hospital in Oakland. Emerald died on December 4.

4. *The Investigation*

On December 2, Fort Bragg Police Officer Chris Awad interviewed Soloniuk, McCullough, Josh, and Skinner at the hospital. Josh told Awad that on the evening of December 1, at about 11:15 p.m., he placed Emerald on a changing pad that was sitting on a dining room bench. Josh left Emerald alone momentarily, but then heard Emerald crying. He found her on the floor with the changing pad on top of her. Josh did not observe any significant injuries—just a bloody nose. Josh believed one of his dogs might have knocked the pad off the bench.

Josh told Awad that he continued with his normal evening activities after the fall. He fed Emerald, went to sleep, and arose at 2:30 a.m. when Emerald needed to be fed again. She was not able to hold down her formula, but Josh said vomiting was normal for Emerald. Emerald awoke again at 5:00 a.m., and Josh gave her another bottle without any problems. She went back to sleep around 6:15 a.m. At about 8:00 a.m., when Emerald was in her swing, S.T. woke Josh to ask about Emerald. Josh noticed more bruising at that time. At about 10:45 a.m., Josh thought Emerald did not look right. He first thought she was sleeping but then noticed she was not breathing. After beginning CPR, Josh went next door to get S.T., and they took Emerald to the hospital.

On December 5, Awad interviewed Josh at the police department. In addition to the events Josh described in his first interview, Josh added that when he noticed Emerald was not breathing, he yanked her out of her swing by grabbing her left arm. He put his

hand behind her back when he went to put her down, but she hit her head on the floor. Josh later recreated the scene for Awad at the Tubbs' home. Awad put a book on the changing pad to represent the weight of a baby. To knock the pad off the bench, another police officer had to actually grab the pad and throw it.

On December 3, Emerald was examined by Dr. Rachel Gilgoff, a child abuse pediatrician at Children's Hospital. Although she could not see Emerald's scalp due to the presence of bandages and drains, Gilgoff observed bruising on Emerald's face, ear, left arm and chest. The x-rays and radiographic images taken the day before showed "massive collections of blood [and] bloody fluid in her brain." The images also showed two skull fractures. One fracture was on the right side of the back of Emerald's head, the other was on the left side.

Gilgoff said that a fall off a changing table onto a hardwood floor could not account for the traumatic injuries she observed. Usually nothing happens when a child suffers such a fall. If an injury occurs, it is at a single impact site, not at multiple impact sites. Emerald's ear bruise was of particular concern because it is very difficult to accidentally injure one's ear. Gilgoff viewed it as a clear case of child abuse.

Gilgoff attended an autopsy performed by Dr. Thomas Rogers, a forensic pathologist. On Emerald's head and neck, Rogers identified 20 areas of injury—each containing one or more bruises, contusions, or scrapes.⁷ The bruises appeared in a number of colors, indicative of different ages. However, none were yellow—the color of old bruises. In addition to the bruises on her head, Emerald had a bruise on the right arm, three on the left upper arm, two over her left wrist, one over her knuckle, and one on her chest to the inside of her right nipple. She also had scraping on her forehead. Rogers

⁷ The bruises on Emerald's head included eight on the right back side, one on the left back side, three in the area of her left ear, two or three on the top and to the left of the midline, one on the left side and slightly behind the ear, three or four on the left side above her ear, one on the right side above her ear, one on the right side by her forehead, three near the right eyebrow, one by the left eyebrow, 12–15 in the area of her left eye, three on her left cheek, one to the outside of her left eyebrow, three or four in the left ear, and one in the area of the right ear.

determined the cause of death to be “cerebral insufficiency due to blunt injuries to the head.” According to Rogers, the injuries were not accidental and could not have been caused by falling off a bench onto hardwood floor.

Another pathologist, Dr. Hannes Vogel, examined Emerald’s brain. Emerald had a three-inch skull fracture on the left side of her head, running from the area of her ear to the back of her head. Another fracture was found on the right back side of her skull. Vogel testified that Emerald’s brain was significantly heavier than what would be expected for a child of her age. The weight was the result of swelling. A hemorrhage was found under the membrane covering the brain, under which there was bleeding into the brain itself. The brain was so swollen that it was flattened rather than showing the gentle undulations of a normal brain surface. The cerebellum was fragmented and falling apart, and a portion of the brain stem had been pushed through the bottom of the skull. The dura showed the presence of subdural hemorrhages and evidence of a prior hemorrhage, which had probably occurred at least a week earlier.

An examination of Emerald’s eyes showed severe hemorrhaging into the retina of the right eye. That hemorrhage also showed signs of an older injury. There was also an optic nerve sheath hemorrhage, which is usually seen with “severe inflicted head trauma or shaking.” Vogel described the damage to Emerald’s brain as “global,” likely due to both nonaccidental shaking and a nonaccidental blow to the head. The injuries were not consistent with a facedown fall onto hardwood floor. Gilgoff noted that a fall from a high place, as opposed to the short fall described by Josh, can cause one or two retinal hemorrhages. Emerald, however, had hemorrhages in all three layers of her retina, so the injury was very severe.

Gilgoff reviewed Emerald’s prior medical records. Gilgoff acknowledged that the ultrasound for brain bleeding—performed when Emerald was nine days old—was not the best test. However, the reports indicated that Emerald appeared well. Gilgoff said, “whatever happened at nine days of age didn’t leave any noticeable permanent effects.”

Emerald’s medical records indicated she was a healthy, normal child until November 2, when she was vomiting and her head circumference increased significantly.

This may have indicated she had a head injury. By the time of the November 13 Early Start assessment, however, Emerald was “clearly neurologically impaired.” Gilgoff testified that there were several indications Emerald had suffered multiple instances of traumatic abuse. Separate violent physical assaults likely occurred around November 2 and sometime around December 2.

The two incidents described by Josh—a fall from a bench 21 inches above hardwood floor and Emerald hitting her head during CPR—could not account for the severity, type, or number of injuries Emerald suffered. Gilgoff testified: “[I]f [Josh] needed to do CPR something terrible and horrific had already happened to the baby [¶] . . . [¶] Horrific in that about a third of the patients with abusive head trauma died, so it was horrific in that she died.” Gilgoff also testified that if the injury to Emerald happened at about 11:00 p.m., as described by Josh, she would not have been feeding normally at 2:00 a.m. or generally behaving normally until shortly before she went to the hospital.

On December 8, police investigators interviewed Josh again. A video and audio recording of the interview was played for the jury. Initially, Josh gave a similar description of events to that he had previously given. As the interview continued, however, Josh described additional events he had not previously mentioned. Josh stated that, at some point, Emerald would not stop crying even after he put her in her swing. He also said, “I might have smacked her upside the head once . . . but . . . I don’t even really remember it.” He stated, “I kind of just got irritated cause it was . . . you know I did what I shouldn’t have done, I smacked her upside the head” Josh said he used his open right hand to hit Emerald once, on the left side of her head. Josh had never hit or shaken Emerald before. Josh also told the investigators that when he noticed that Emerald was not breathing on Sunday morning, “[he] yanked her out of her swing and . . . then went straight down to the floor . . . and . . . she banged her head.” He acknowledged that he shook Emerald “a little bit, to try and just to . . . get her to wake up” He then admitted, “I might have shook her a little bit . . . the same night I smacked her in the head.” Josh said the shaking caused Emerald’s head to snap forward twice.

B. *Defense Case*

At trial, Josh returned to his initial account of events. Josh denied inflicting Emerald's injuries; he did not hit her with an open hand, punch her, or shake her. He told the police he had smacked Emerald because "[he] knew that they were looking for a specific thing; and if they didn't get it from me, they were going to get it from somebody else. So I told them what they wanted to hear." Josh suggested there were signs something was wrong with Emerald from the very beginning of her transition to their home. During her first visits with his family, Emerald would look at him but then wander off. She seemed able to pick up bright colors but would lose sight of them. Emerald would also cry when Josh returned her to Ostler's house. Emerald began vomiting before October 31—the day she officially moved into the Tubbs' home.

On cross-examination, Josh acknowledged that when he placed Emerald and her pad on the bench, the base of her empty car seat was also sitting on the bench. He could not explain how a dog could have knocked the pad, holding Emerald, off the bench without causing the car seat base to move. He assumed the bruising inside Emerald's ear occurred because the swing leg was next to the bench and her ear must have hit it when she fell. Initially, he could not explain to the prosecutor how Emerald received the bruises on the top of her head, but then surmised something must have happened during the ride to the hospital. Although Josh agreed that Emerald's injuries could have been caused by hitting and shaking her in the way he described to investigators on December 8, he insisted that he lied so the police would not question S.T. about it. However, Josh knew at the time he admitted hitting the baby that police had already interviewed S.T. twice. Josh also initially denied taking any drugs or prescription medication while watching Emerald, but then admitted having taken up to three hydrocodone a day for pain. He said he stopped taking it about a week before the accident.

On redirect examination, Josh conceded that he no longer thought the dog had knocked Emerald off the bench. Instead, he said, "I think he moved her to where her shoulders and upper body came off the bench and then she rolled."

S.T., Marte, and Johnston testified they never heard Josh yell or saw him hurt anyone. Both Marte and Johnston testified that, since the beginning of her time at the Tubbs' home, Emerald was fussy and had some difficulty developing motor skills. Josh never expressed any negative thoughts about adopting Emerald.

C. *Rebuttal*

The prosecutor played a tape recording of a jail telephone conversation between Josh and S.T. Josh told her, "I hope mom's little weekend away . . . was worth all of this . . . [¶] . . . [¶] None of this would have happen . . . [¶] . . . [¶] [I]f . . . she . . . just stayed home . . . I would have been at grandpa's . . . the baby would still be fine." S.T. replied, "Accidents happen." Josh said, "Yea they do, but . . . I think this would . . . have been avoided if mom would have been home when she was suppose to be."

The prosecutor also played recordings of two jail telephone conversations between Josh and Marte. In the first conversation, Josh told Marte that "[Emerald] fell twice that night . . . I kind of spaced it out . . . but . . . she fell off the kitchen table too . . . that night . . . within five minutes of her falling from the bench." Marte told Josh to wait and tell his lawyer everything. Josh continued, and Marte asked whether Emerald fell on her back. Josh replied that she landed on her face and stomach again. Once more, Marte told Josh to talk to his lawyer. Shortly thereafter, Josh called Marte back to tell her that Emerald "did land on her back, it knocked the wind out of her" ⁸

D. *Closing Argument and Verdict*

The prosecution asserted that Emerald's death resulted from blunt force trauma inflicted by Josh. The defense's primary theory was that Josh never hit or shook Emerald, and her death was due to an "accumulation" of events. The defense argued: "Can [Josh] explain to you the nature and extent of Emerald's injuries? No. . . . He can't because he doesn't know. [¶] . . . [¶] [S]omething happened sometime between October

⁸ Josh testified he did not remember telling Marte about a second fall because at the time of the calls he was taking multiple insomnia and anxiety medications that made him hallucinate and forget things. Marte agreed that while Josh was on medication at the jail, not all of his conversations made sense.

23rd and November 2nd. And Josh and I aren't pointing fingers. . . . We're just saying . . . [¶] . . . [¶] [t]here was something going on with Emerald from the beginning." In the alternative, defense counsel argued: "Let's just say . . . that [Josh] slapped [Emerald] on the side of the head. Let's assume that [Josh] shook this baby. Did [Josh] know . . . with the doctors telling him regularly nothing was wrong with that baby, did he know that that conduct would result in her death? I don't think you have enough from which to render that conclusion."⁹

The jury found Josh guilty of assault on a child causing death, and he was sentenced to a prison term of 25 years to life. He filed a timely notice of appeal.

II. DISCUSSION

Josh contends that his conviction should be reversed because his federal due process rights were violated by the prosecutor's misconduct in closing argument. " 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due

⁹ Defense counsel's argument misstated the law. "Section 273ab defines the offense of child abuse homicide. The elements of the offense are: '(1) A person, having the care or custody of a child under the age of eight; (2) assaults this child; (3) by means of force that to a reasonable person would be likely to produce great bodily injury; (4) resulting in the child's death.' [Citations.] The manifest purpose of section 273ab is 'to protect children at a young age who are particularly vulnerable.' [Citation.] [¶] . . . [¶] [A]ssault does not require a specific intent to injure the victim. . . . [T]he criminal intent required for assault is 'the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.' [Citation.] Put another way, '[t]he mens rea is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery. Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm.' [Citations.] [¶] . . . [¶] [A] defendant may be guilty of an assault within the meaning of section 273ab if he acts with awareness of facts that would lead a reasonable person to realize that great bodily injury would directly, naturally, and probably result from his act. [Citation.] The defendant, however, need not know or be subjectively aware that his act is capable of causing great bodily injury. [Citation.] This means the requisite mens rea may be found even when the defendant honestly believes his act is not likely to result in such injury." (*People v. Wyatt* (2010) 48 Cal.4th 776, 780–781, fn. omitted.)

process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.’ ” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305; *People v. Hill* (1998) 17 Cal.4th 800, 819.) For state law errors, we determine whether “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Arias* (1996) 13 Cal.4th 92, 161; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on other grounds by *Stansbury v. California* (1994) 511 U.S. 318, 326.) “[A] ‘probability’ in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.” (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics omitted.)

First, Josh complains that the prosecutor “misstated a critical piece of evidence” when he argued, “[Gilgoff] says [this is] one of the worst cases of child abuse she’s seen in her career.” Josh insists this was “false evidence” because Gilgoff characterized Emerald’s injuries in this language during her preliminary hearing testimony—not at trial. In clarifying what she meant by “horrific child abuse” in her report, Gilgoff’s preliminary hearing testimony was that “[i]t’s definitely if not the worst, it’s one of the worst cases I’ve seen so far in my career and, you know, definitely evidence of a violent physical assault”

Next, Josh maintains the prosecutor impermissibly urged the jury to convict out of sympathy for Emerald. At the conclusion of the People’s rebuttal, the prosecutor argued: “Baby Emerald . . . she really just couldn’t catch a break. The system that was supposed to protect her didn’t do it. . . . [¶] . . . It wasn’t this child’s fault that her mother had mental issues and drug issues. It wasn’t her fault that her dad was in jail. It wasn’t her fault that in the middle of her thriving with [Ostler] and doing well she was taken away, and taken to what looked like an appropriate home on its surface. . . . And it wasn’t her fault on December 1st . . . with how she felt because she was crying or fussing that irritated or angered [Josh] to the point where he struck the child, hit the child, caused

skull fractures, violently assaulted her, shook her, a five-month-old innocent baby. [¶] . . . [¶] Baby Emerald just couldn't catch a break. And I hope you break that cycle today. I hope you break that cycle today and find her killer guilty.”

Even if we were to agree that one or both instances cited by Josh rise to the level of misconduct, we are not persuaded that either instance, or both taken together, would necessitate reversal. First, Josh forfeited his misconduct claims by failing to object in either instance. In order to preserve a claim of prosecutorial misconduct, a defendant must object and request admonishment at trial. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) Prosecutorial misconduct to which a defendant raised no objection is reviewable only if an admonition would not have cured the harm caused by the misconduct. (*Ibid.*) Josh does not suggest an admonition would have been futile. Instead, Josh contends that his trial counsel's failure to object constituted ineffective assistance. Accordingly, we consider his misconduct claim under that rubric.

Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684–686; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) This right “entitles [the defendant] to ‘the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.’ ” (*Ledesma*, at p. 215.) To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was so deficient that it fell below an objective standard of reasonableness, under prevailing professional norms and (2) that the deficient performance was prejudicial, rendering the results of the trial unreliable or fundamentally unfair. (*Strickland*, at pp. 688, 692; *Ledesma*, at pp. 216–217.) To satisfy the prejudice requirement, a defendant “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland*, at p. 694.) Josh's ineffective assistance of counsel claim lacks merit.

A. *False Evidence*

“A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) However, “ ‘[u]nder well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted.’ ” (*People v. Morrison* (2004) 34 Cal.4th 698, 716.) A prosecutor also commits misconduct when, during argument, she suggests the existence of “facts” not in evidence. (*People v. Bolton* (1979) 23 Cal.3d 208, 212; *People v. Woods* (2006) 146 Cal.App.4th 106, 113; *People v. Wirth* (1960) 186 Cal.App.2d 68, 77–78 [prosecutor referred to preliminary hearing testimony not in the record].) The danger in such argument is a suggestion that additional evidence is known to the prosecutor but unavailable to the jury. The prosecutor becomes an unsworn witness who is not subject to cross-examination. (See *Bolton*, at p. 213; *People v. Hall* (2000) 82 Cal.App.4th 813, 817.) “ ‘Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.’ ” (*People v. Hill, supra*, 17 Cal.4th at p. 828.)

In contrast to the authority relied on by Josh, the prosecutor in this case did not present “false evidence” or suggest factual information was known only to him. (See *Miller v. Pate* (1967) 386 U.S. 1, 5–6 [prosecution repeatedly described pair of undershorts as being stained with blood when they were actually stained with paint]; *People v. Bolton, supra*, 23 Cal.3d at p. 212 [prosecutor hinted he could show the defendant had prior convictions]; *People v. Woods, supra*, 146 Cal.App.4th at pp. 112–113 [prosecutor asserted evidence of police officer’s misconduct “ ‘doesn’t exist’ ”].) At trial, Gilgoff did *not* characterize Emerald’s injuries as “one of the worst cases” she had seen, but did characterize the injuries as “horrific.” She explained, “Horrific in that about a third of the patients with abusive head trauma die, so it was horrific in that she died.” Furthermore, there was evidence that Emerald suffered extensive bruising to her head, two skull fractures, and multiple hemorrhages. Given the evidence, the prosecutor did

not unreasonably characterize Emerald's injuries. In any event, any error was harmless, as we demonstrate *post*.

B. *Appeal to Sympathy*

"[I]t is settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct . . . ; an appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057; accord, *People v. Talle* (1952) 111 Cal.App.2d 650, 676.)

One can construe the prosecutor's suggestion that the jury should "break that cycle" as an emotional appeal to the jury—suggesting the jury should convict Josh in order to hold someone responsible for Emerald's death, not because the evidence showed Josh's guilt beyond a reasonable doubt. But the comment was brief and isolated, and certainly less extreme than the arguments at issue in the cases Josh cites. (See *People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057 [prosecutor asked jury to "[t]hink what [10-year-old] must have been thinking in her last moments of consciousness during the assault" (italics omitted)]; *People v. Talle*, *supra*, 111 Cal.App.2d at p. 673 [prosecutor argued he had undertaken prosecution of defendant " 'to avenge the cruel death of an innocent girl at the hands of a man whom society now regards not as a man but as a beast' "]; *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1224 [prosecutor vouched for government witnesses and suggested it was the jury's "duty" to convict].) However, even if we were to find that the prosecutor committed misconduct and Josh's counsel had no valid tactical reason for failing to object, Josh's ineffective assistance of counsel claim must be rejected because he has failed to demonstrate a reasonable probability the outcome of his trial would have been different absent that error.

C. *Prejudice*

"In considering a claim of ineffective assistance of counsel, it is not necessary to determine ' "whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." ' ' ' " (*People v. Mesa* (2006) 144 Cal.App.4th 1000,

1008.) The standard for prejudice on an ineffective assistance of counsel claim is “a reasonable probability that, but for counsel’s error, the verdict would have been different.” (*People v. Neely* (2009) 176 Cal.App.4th 787, 796; *Strickland v. Washington*, *supra*, 466 U.S. at pp. 691–694.)

Josh contends the misconduct rendered his trial arbitrary and fundamentally unfair, in violation of the Fourteenth Amendment to the federal Constitution, and that we should apply the *Chapman* standard for prejudice. When misconduct infringes a defendant’s constitutional rights, reversal of the conviction is required, unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury’s verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Hall*, *supra*, 82 Cal.App.4th at p. 817.) We disagree. Any misconduct in this case did not render Josh’s trial fundamentally unfair.

Assuming the prosecutor’s isolated comments were an appeal to sympathy for Emerald, the comments could have had little effect on a trial that would have been palpably emotional by its very nature. The entirety of the objectionable argument comprised three sentences in the prosecutor’s closing argument, which spanned more than 60 pages in total and was otherwise focused on the evidence. The trial court instructed the jury not only that statements of the attorneys are not evidence but also that the jury should not allow sympathy for the victim to influence its decision. These instructions “would have dispelled any prejudice.” (*People v. Hinton* (2006) 37 Cal.4th 839, 863.) We presume that the jury followed those instructions. (*People v. Najera* (2006) 138 Cal.App.4th 212, 224.)

This was not a close case. Josh’s credibility was a major problem for the defense. In his initial statements, Josh claimed that Emerald only fell from her changing pad. Later, however, he admitted both hitting and shaking Emerald. At trial, Josh returned to his original story and denied hitting or shaking Emerald. Even though he changed his account several times, Josh was never able to explain the extent, nature, or placement of Emerald’s injuries.

On the other hand, medical evidence in this case was compelling and completely contradicted Josh's version of events. Every single medical professional testified that Emerald's injuries were inconsistent with either short fall Josh described. Vogel and Gilgoff both opined that nonaccidental blunt force head trauma must have been involved. There were bruises to 20 different areas of Emerald's head, a fracture on each side of her skull, and multiple hemorrhages within Emerald's brain and retina. It is simply implausible that Emerald's catastrophic injuries were caused by simply falling off of the changing pad.

Recognizing as much, Josh contends that, even if the jury believed he hit and shook Emerald, the prosecutor's mischaracterization of Gilgoff's testimony may have been prejudicial to the jury's determination of whether he acted with the requisite mens rea. It is not reasonably probable that, as Josh suggests, a jury hearing Emerald's injuries described as "horrific" rather than "one of the worst cases of child abuse," would reach a different conclusion on whether Josh was aware of facts that would lead a reasonable person to realize that great bodily injury would directly, naturally, and probably result from his act. (See *People v. Wyatt*, *supra*, 48 Cal.4th at p. 781.) Given the strength of the evidence against Josh, the limited nature of any misconduct, and the trial court's proper instructions, there is no reasonable probability the outcome of Josh's trial would have been different absent error.

III. DISPOSITION

The judgment is affirmed.

BRUINIERS, J.

WE CONCUR:

JONES, P. J.

NEEDHAM, J.